

River West Development Limited Partnership and Service Employees Local No. 1, Service Employees International Union, AFL-CIO. Case 13-CA-30048

May 28, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 21, 1992, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, River West Development Limited Partnership, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting in part.

I agree that the Respondent violated Section 8(a)(1) when it coercively interrogated employee Pavlovic and

¹ In agreeing with the judge that a bargaining order is warranted, we rely solely on the reasoning of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and not on the Respondent's lack of good faith.

Contrary to our dissenting colleague, we find that terminating one of the three unit employees for discriminatory reasons immediately following an explicit and unlawful threat to do precisely that and an unlawful interrogation, is sufficient to warrant issuance of a bargaining order. See *Soil Engineering & Exploration*, 269 NLRB 55, 79 (1984). Swiftly responding to the Union's recognition demand, the Respondent's co-general partner discharged the leading union adherent, the employee who had contacted the Union for authorization cards which he and another coworker signed. Particularly in a small unit, the impact of discharging one-third of the unit has a greater effect and is likely to chill Sec. 7 rights in the entire unit. See *Eastern Steel Co.*, 253 NLRB 1230, 1241 (1981), *enfd.* 671 F.2d 104 (3d Cir. 1982). We do not think that top management's unlawful conduct will be dissipated over time or be lost on the replacements for the unit employees. In our experience, where an employer discharges one-third of the unit for union activity, the unit employees, both new and old, will know about it, and the powerful underlying message—that this employer will not readily suffer its employees to join the union—cannot be canceled by reinstating the dischargee with backpay after the fact. This is particularly so where, as here, the manager who committed the unfair labor practices is still in control of the labor relations of the unit employees. In these circumstances, the possibility of erasing the effects of the Respondent's unfair labor practices is slight and a bargaining order is thus the only means of restoring the status quo ante.

threatened him with discharge because he engaged in union activity, and Section 8(a)(3) when it subsequently discharged Pavlovic because of his union activity. I would not, however, issue a bargaining order. In my opinion the evidence is insufficient to establish a propensity on the part of the Respondent to violate the Act. I find that one violation of Section 8(a)(3) is unlikely to convey to the other employees that the same action will happen to them. Further, any anxiety the employees may harbor over the Respondent's intentions will be ameliorated by the Board's order reinstating Pavlovic and its notice posting requirement. I would therefore not issue the bargaining order and would dismiss the 8(a)(5) allegation.

Aaron Karsh, Esq., for the General Counsel.

Ralph A. Morris and Mark Fishman, Esqs., for River West Development Limited Partnership (Respondent).

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Chicago, Illinois, on March 2 and 3, 1992, pursuant to charges filed by Service Employees Local No. 1, Service Employees International Union, AFL-CIO (the Union), on February 2, 1991, and served on February 27, 1991, and complaint issued September 30, 1991, alleging Respondent threatened and interrogated employees in violation of Section 8(a)(1) of the National Labor Relations Act (the Act); terminated and failed to reinstate Paul Pavlovic on February 21, 1991, in violation of Section 8(a)(1) and (3) of the Act; and refused to bargain with the Union in violation of Section 8(a)(1) and (5). The Respondent denies the commission of unfair labor practices.

On the entire record, the testimonial demeanor of the witnesses testifying before me, and the able posttrial briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. BUSINESS OF RESPONDENT

Respondent is an Illinois partnership engaged in the business of ownership of apartments with an office at 925 West Huron Street, Chicago, Illinois. During the calendar year preceding the issuance of the complaint in this proceeding, Respondent derived gross revenues in excess of \$500,000 from the operation of the business, and purchased and received products, goods, and materials from companies located in the State of Illinois who purchased and received products, goods, and materials valued in excess of \$5000 directly from points outside the State of Illinois. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORS AND AGENTS

Marc Berger is a cogeneral partner of Respondent and an admitted agent of Respondent within the meaning of Section 2(13) of the Act.

Tina Partipilo is alleged to have been, at times material to this proceeding, a property manager and statutory supervisor and agent of Respondent. The parties stipulated that Partipilo was Respondent's employee at its 925 West Huron Street, Chicago, Illinois facility, where Paul Pavlovic worked from January 1 through March 1, 1991. Partipilo's employment by Respondent continued until her discharge on or about November 15. She did not testify.

Respondent denies Tina Partipilo was its supervisor or agent within the meaning of Section 2(11) and (13) of the Act, points out General Counsel has the burden of proving such status,¹ and relies on the testimony of Marc Berger that Partipilo's primary responsibility was to "be involved in resident relations, collecting rents and to coordinate with the assistant manager of the leasing of the apartments."

General Counsel argues, and I agree, that the evidence supports a finding Tina Partipilo was a 2(11) supervisor of Respondent at the times material to this proceeding because she issued daily work assignments to the maintenance/janitorial employees, issued written warnings to employees, and granted time off, all without any prior consultation with Marc Berger or any other supervisor, management official, or agent of Respondent. Partipilo was, as Section 2(11) prescribes, an individual with authority to exercise independent judgment in the interest of Respondent to, at the very least, assign, discipline, and responsibly direct employees. Add to this that she granted Pavlovic leave on his request without checking with superior authority, recommended the discharge of Keith Jones to Berger who effected the discharge without further investigation, and there is no persuasive evidence of any direct supervision of Pavlovic and the janitors from anyone but Partipilo, and the evidence clearly preponderates in favor of a finding Partipilo was a 2(11) supervisor whose conduct may be imputed to Respondent.² With respect to Respondent's argument in its brief that Partipilo's duties were only administrative as of February 11, there is no evidence other than Marc Berger's ipse dixit to that effect to support this contention that her duties and authority changed by that date. Accordingly, the contention is rejected as unsupported by credible probative evidence.

IV. ALLEGED UNFAIR LABOR PRACTICES

The conduct described took place at River West Lofts (Lofts), an apartment building owned by Respondent at 925 West Huron Street, Chicago, Illinois. Respondent contracted with Draper and Kramer, Incorporated to be the managing agent for the Lofts facility in the late 1980s. Thereafter, Draper and Kramer managed the property, including maintenance and janitorial functions even though the employees doing this were employees of Respondent. By letter dated January 23, 1991,³ Draper and Kramer notified Respondent it was terminating its management agreement on February 21. On or about January 28, Draper and Kramer turned over the tenants' security deposits to Respondent and ceased its

management function. Respondent's partners then formed River West Management, Inc. (Management, Inc.) with Marc Berger as its president to manage Lofts. Tina Partipilo, Paul Pavlovic, Keith Jones, and Barbara Dukala remained Respondent's employees after the management corporation was formed.

Paul Pavlovic became the maintenance engineer at the Lofts in March 1990. He was hired by Draper and Kramer but was on Respondent's payroll and was its employee until his dismissal here at issue. Late in December 1990, Pavlovic estimates during the last 5 workdays, he told Partipilo he was going to visit a union to ascertain how union benefits compared to those received by Respondent's employees. Partipilo told him he could go to the Union, but there was no difference in benefits. Pavlovic said he did not believe that and was going to find out what the truth was.

On January 11, Pavlovic visited the union offices, talked to Carl Rocconi, a union representative, about joining the Union, secured two union authorization cards and other literature, and returned to work. He signed an authorization card⁴ on January 11 and mailed it to the Union. There is no evidence it was not received in the normal course of the mail, and I conclude it was so received.

When he returned from visiting Rocconi on January 11, Pavlovic, either that day or the next workday, told Partipilo what he had done. She asked why he did not find another job and leave Respondent if he wanted to be in the Union. He replied that he wanted to stay with Respondent and receive everything that janitors who were union members received. Between that date and February 11, Pavlovic repeatedly asked Partipilo why the Respondent would not put its employees in the Union. Her standard reply was that he could not be in the Union there, why did he want to be, and he should find an employer who wants him to be in the Union. During this period, Pavlovic secured a signed union authorization card from janitor Keith Jones on January 21.

The Union's counsel dispatched a letter on February 7, received by Respondent on February 11, reading, in relevant part, as follows:

River West Lofts
925 W. Huron St.
Chicago, Illinois 60622
Re: Draper & Kramer d/b/a
River West Lofts
925 W. Huron St.
Dear Sir or Madam:

This office represents Service Employees Local No. 1. On behalf of the Union, we hereby request recognition of the unit consisting of your janitorial and maintenance employees performing such services at River West Lofts, 925 W. Huron St. in Chicago. Upon the request of your janitorial and maintenance employees that the Union represent them as their collective bargaining agent, the Union is today filing a Petition for Certifi-

¹ See, e.g., *Staco, Inc.*, 244 NLRB 461 (1979).

² *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).

³ Hereafter all dates are 1991 unless otherwise specified.

⁴ The card authorizes the Union to represent the signer "for the purpose of collective bargaining with my employer, and to negotiate and conclude all agreements respecting wages, hours, and other terms and conditions of employment. I understand that this card can be used by the Union to obtain recognition from my employer without an election."

cation of the unit with the National Labor Relations Board.

In the event that you are prepared to recognize the Union and negotiate a Labor Agreement containing the terms and conditions of employment of your employees, please call this office at the earliest possible time to arrange for a meeting with representatives of the Union.

We look forward to hearing from you.

The letter clearly confirmed the knowledge to Berger that Respondent's employees were involved in union activity.

The parties stipulated that from January 14 to February 20 a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act was

All full-time and regular part-time janitorial, maintenance, and cleaning employees employed at Respondent River West Development Limited Partnership's facility at 925 W. Huron Street, Chicago, Illinois; but excluding office clericals, guards and supervisors as defined in the Act, and all other employees.

The parties also stipulated that Paul Pavlovic, Keith Jones, and Barbara Dukala were the only employees in this unit during the period described and Respondent has not recognized or bargained with the Union as the exclusive bargaining representative of the unit employees since February 11.

Partipilo received the Union's letter and called Pavlovic into her office, on February 11 or 12, showed him the letter, and asked if he knew anything about it. Pavlovic's testimony concerning what else was said is confused. Some of this is due, I believe, to language difficulty of Pavlovic making his testimony almost impossible to decipher in some instances. For instance, he states Partipilo, after showing him the letter, responded as follows: "She showed me why you out, why you bullshit with the union. She said no time to blame to do now." All one can say with any degree of certainty from this testimony is that Partipilo asked him why he "bullshit" with the Union. At this point, Pavlovic's recollection seemed to fail. Over objection, General Counsel was permitted to attempt to adduce further testimony on the meeting. Asked if he remembered anything else he said, Pavlovic recollected saying he always wanted to be in the Union, joined it, and they were responding to his wish. This, he says, caused Partipilo to say the Union is bullshit and its pension plan was only \$200, to which he replied that was fine if he got \$200 more in pension. At this point, recalls Pavlovic, Partipilo reminded him she had said he would not be in the Union there and he should first find another job and not give her any more headache. He then again testified he remembered no more, but, in response to a leading question over objection, says Partipilo said, "I know you know you can be fired too because of this."

Keith Jones testified that he was at the facility on February 12 at 9 a.m. when he saw Pavlovic standing in the doorway of Partipilo's office and heard her say to Pavlovic "what was he trying to do get fired. That he was bring trouble to the job," which drew Pavlovic's statement to the effect he was trying to get better benefits. Shown his pretrial affidavit dated March 12, 1991, and stating he overheard Partipilo and Pavlovic at about 2 p.m. on February 12, Jones changed his testimony to be that he now believes it happened at 2 p.m.

Standing alone, this shift of time from 2 p.m. pretrial, 9 a.m. at trial, and then back to 2 p.m. would raise a question of testimonial accuracy, but more serious is the inconsistency in testimony posed by Pavlovic's testimony his conversation was behind closed doors rather than as Jones describes it. Both cannot be correct, nor can both be correct concerning what Partipilo said. Her absence as a witness makes the question more difficult, but no adverse inference is drawn from Respondent's failure to call her as a witness because the evidence is that Partipilo was discharged for cause. Although it is troubling that Pavlovic had considerable difficulty in recalling what Partipilo said, I do not believe this is enough to defeat his recollection, tardy and prompted though it was. Pavlovic was a more impressive witness than Jones in terms of testimonial conviction and believability and his version is credited for that reason and the further reason it is consistent with the tenor of the conversations he earlier had with Partipilo. Pavlovic did not impress me as one who would deliberately put words in Partipilo's mouth that she did not speak, although those words may well have suffered in the transition due to Pavlovic's occasional language problems. Accordingly, I conclude that Partipilo did violate Section 8(a)(1) of the Act by advising him he could be fired "because of this," which I find was a reference to the Union's letter. Such a statement clearly implied his union activity might cause his discharge, a chilling message reasonably tending to interfere with, restrain, and coerce him in the exercise of his Section 7 right to seek union representation. Furthermore, even though he was the known union organizer at the facility and often engaged Partipilo in conversation wherein he advised her of his quest for union representation and fully explained the extent of his activity, I do not believe her interrogation concerning what he knew about the Union's letter was of a type permissible under *Rossmore*.⁵ Here it was accompanied by a plain threat which cast a coercive pall over her other statements, and it was not confined to a question of Pavlovic's sentiments as in *Rossmore*. Accordingly, I conclude and find Partipilo here coercively interrogated Pavlovic in violation of Section 8(a)(1) of the Act.

Paul Pavlovic was discharged by Marc Berger at about 7:30 a.m. on February 21. According to Berger, when questioned by counsel for the General Counsel as an adverse witness, he told Pavlovic that although he appreciated Pavlovic's past efforts on Respondent's behalf it was in the best interest of Management, Inc. to put its own new team in place. Berger further stated he told Pavlovic that from his observation of the condition of the building and the lack of maintenance he believed someone must be held accountable in the future and, "I did not want to have the inner play that my superiors, the other management company were aware of certain things." This cryptic remark is unexplained. Pressed, Berger added that he expressed displeasure with Pavlovic's conduct in calling outside contractors to perform what Pavlovic should have been able to do, and also told Pavlovic he did not believe Pavlovic had control over supplies located on the premises because he, Berger, had discovered light

⁵ *Rossmore House*, 269 NLRB 1176 (1984), overruled cases holding employer questioning of open and active union supporters about their union sentiments necessarily interferes with, restrains, and coerces employees in the exercise of Sec. 7 rights in the absence of threats or promises.

bulbs in a storage room after Pavlovic told him there were none in the building. Called as a witness by Respondent on the following day, Berger testified that he now recalled he told Pavlovic, "Paul, the partnership appreciates what you have done on its behalf, but going forward we feel we need somebody who can take the building out from where it is and get it to a more stronger individual," and mentioned the light bulb incident as one of the straws that broke the camel's back. He then told Pavlovic that he would try to help him get another position and might need his cooperation in a possible future lawsuit with Draper and Kramer.

Pavlovic testified that Berger handed him his pay and vacation checks and said it was Pavlovic's last day to work there. This, says Pavlovic, shocked him, and he asked why he had not been given prior notice, which drew no answer. He continues that Berger told him the dismissal was not Pavlovic's fault, he was a victim of "some transactions,"⁶ Berger had to do it, and Berger would find him a job through friends Berger had at another company. Pavlovic states Berger gave him no other reasons for the termination, and denies that he ever discussed burnt out light bulbs in or near elevators with Berger, or ever talked to Berger about outside contractors, discussed the organization of stockrooms, or talked to Berger about air filters, fan belts, or exhaust risers. He also denies ever running out of light bulbs.

Pavlovic and Berger agree that Berger was nervous during this meeting, due to his inexperience at terminating employees according to Berger. Considering that Berger was admittedly not at ease in his role as the carrier of bad news, and Berger's testimony that he solicited Pavlovic's cooperation if a legal confrontation with Draper and Kramer ensued, it is likely that Berger did make an effort to maintain good relations with Pavlovic by placing the blame for the discharge primarily on business necessity. While he may not have, as Pavlovic testified, expressly assured Pavlovic his faults were not the reason for the discharge, his tack in alluding to a need for change for the future while at the same time expressing his appreciation for Pavlovic's efforts plainly conveyed, especially when linked with personal assurances of assistance in gaining other employment, the message that Pavlovic's performance was not the reason for the separation. This, I believe, is the message Pavlovic heard, even though perhaps not in those exact terms. The combination of the message of appreciation for Pavlovic's work, which fairly implies satisfactory performance because one does not give appreciation for poor performance, the emphasis on business necessity, and the assurance of employment help, all nervously delivered by a man uncomfortable with his task, is incompatible with the statements of displeasure Berger claims to have made concerning the light bulbs and the subcontracting. Pavlovic was the more believable in reciting the conversation between the two and is credited that he was not confronted by Berger with any criticism of his work performance. In this latter connection it is noteworthy that Pavlovic never received any criticism, warnings, or discipline concerning his work performance during his tenure of employment which commenced in early 1990 and, the day after his discharge, Tina Partipilo, then working directly for Marc Berger who had taken over management of the premises, issued Pavlovic a letter of recommendation on Respondent's

letterhead noting that he had been "conscientious, willing and extremely capable as the Building Engineer for River West Lofts" and that she would not hesitate to hire him again.

Pavlovic's enthusiastic efforts to secure union representation were repeatedly made known to his supervisor, Tina Partipilo, commencing with his visit to the Union and the signing of a union authorization card on January 11. She repeatedly tried to discourage his efforts in that direction by telling him he could not be represented by a union while in Respondent's employ, should look for work with a unionized employer if he seriously wanted such representation, and, with the Union's request for recognition before her, that he could be fired for his involvement. In addition to the well-established principal that Partipilo's knowledge of and hostility toward Pavlovic's union activism is imputable to Respondent as a matter of law,⁷ Respondent maintains an office in the Lofts and the probability that a supervisor located in that office and possessing the knowledge of union activity that Partipilo had would not have discussed within that office or reported such activity to her employer at all is minimal. She was aware of, irritated by, and attempted to discourage Pavlovic's union activity a full month before the union letter was received, and I do not believe she held her tongue for a full month before reporting Pavlovic's conduct to an employer she knew, as her statements to Pavlovic show, was not favorably inclined toward union representation of its employees. Berger's denial of any awareness of Pavlovic's union activity, or any union activity, prior to February 11 is not credited. I find he individually and Respondent as an entity were both aware of Pavlovic's union activity probably commencing on or about January 11 and certainly well before February 11.

When Respondent formed its own management company with Marc Berger as its president he admittedly knew little about the details of building maintenance. Suddenly he was responsible for the management work force put in place by Draper and Kramer. According to Berger he focused on Pavlovic because he wanted employees he could hold accountable for their responsibilities. By so doing he ignored Partipilo, the very person whose job, among other things, was to assign and monitor the performance of Pavlovic and the janitors. It does not appear he consulted with Partipilo or made any particular effort to find out just exactly how she and those she supervised scheduled or performed their duties. An obvious example is his effort to blame Pavlovic for excessive subcontracting when Pavlovic's uncontroverted and credited testimony is that Partipilo authorized each subcontract as it occurred. Logic dictates it would be the manager not the minion who would be responsible for so obligating Respondent's funds. Similarly, Berger lays the fault for using fixtures and parts from one apartment to repair another on Pavlovic, but here again Pavlovic is uncontroverted and credited that Partipilo instructed him to so do. In this connection I must note that I do not believe Pavlovic was credible when he remembered on the second day of trial what he had denied the day before, i.e., that he in fact did savage apartment 111 for parts and appliances, albeit at Partipilo's in-

⁶The record should probably read "circumstances."

⁷*Pinkerton's, Inc.*, 295 NLRB 538 (1989); *Dorothy Shamrock*, supra; *NLRB v. Elliott-Williams Co.*, 345 F.2d 460 (7th Cir. 1965), enf. 143 NLRB 811 (1963).

struction.⁸ Similarly, he had suspicious difficulty in recollecting whether the apartment keys were located in one or more cases or whether there was a master key in a key cabinet. Notwithstanding these deficiencies in his testimony, Pavlovic is credited on those matters where he appears certain and candid and is not contradicted by credible testimony or other relevant evidence.⁹

Returning to events prior to the dismissal of Pavlovic, Berger embarked on a walk through the Lofts premises, on or about February 1, with Stanley Panocha, a building engineer then employed by a firm managing another of Respondent's properties. They found dirty corridors, carpets, and stairways as well as missing light bulbs and door knobs and door stops. The storage areas were disorganized and the box housing keys to apartments left open. Additionally, as previously mentioned, apartment 111 had been denuded of fixtures and parts taken to repair other locations. After this walkthrough, Berger asked Panocha to recommend a qualified person to replace Pavlovic. Panocha recommended Rene Rivera who was interviewed by Berger on February 9, and who accepted Berger's offer of the position of chief maintenance engineer at the Lofts and became Respondent's employee on February 23. Prior to the interview with Rivera, Berger had, on February 7, interviewed Lenny Carrao, also recommended by Panocha, and hired him as an independent contractor to do maintenance work. Carrao commenced working on February 11. For a time, Mrs. Panocha was employed as an outside contractor to do cleaning. Respondent also hired Helena Byisewicz to do cleaning for a couple of months.

Panocha became an employee of River West Management, Inc. on August 17. Tina Partipilo was discharged on or about November 15 from her position as building manager and was told she did not reflect what the management company needed.

Conclusions re Pavlovic's Discharge

Respondent was aware of Pavlovic's prounion activity, advised him it would do him no good, threatened him with possible discharge because of these activities. Ten days thereafter he was discharged by Berger without any inquiry of his superior Partipilo concerning where responsibility for his perceived failure to satisfactorily perform lay, or other investigation. There is no evidence Partipilo was, even though much later discharged, taken to task or even questioned about the extreme shortcomings in maintenance which were her ultimate responsibility as the building manager. Pavlovic received no prior warning concerning his performance, was not asked about perceived deficiencies in his work, and was not confronted on discharge with his alleged failings. The message delivered by Berger on Pavlovic's discharge did, as Pavlovic perceived, in effect exonerate Pavlovic of blame and vaguely focused on the need for better management.

⁸ A videotape made on February 12 confirms that as of that date apartment 111 was missing cabinet and closet doors, shelving, the sink door, the toilet, pieces of the stove, light fixtures and was, generously, a wreck. The maintenance and hot water rooms were in disarray with supplies and other items scattered around the floor.

⁹ It is not uncommon nor improper to credit a witness on some matters but not on others. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

These items taken together are enough to support an inference that Pavlovic's enthusiastic union activity was a motivating factor in the decision to dismiss him. That being the case, Respondent is obliged to show by a preponderance of the evidence that Pavlovic would have been dismissed in the absence of union activity.¹⁰ This is a close issue. Respondent has shown that maintenance in the building was generally haphazard and slipshod, and that it certainly had good reason to take steps to correct this situation, but the singling out of Pavlovic as the sole party at fault is not convincing. Although it is not my prerogative to substitute my business judgment for that of the Respondent, the failure to investigate who was in fact responsible for conduct imputed to Pavlovic, the dismissal of Pavlovic while retaining Partipilo who had overall responsibility for the building's condition, the assurances given to Pavlovic that he was an appreciated employee and Berger would assist him in securing other employment, and the absence of prior warnings or correctional instruction seriously erodes Berger's professed reasons for the separation of Pavlovic to the extent it cannot fairly be said Respondent has clearly shown it would have dismissed Pavlovic in the absence of his union activities. Accordingly, I find General Counsel has proved by a preponderance of the credible evidence that Respondent discharged Pavlovic in an effort to discourage union membership and thereby violated Section 8(a)(3) and (1) of the Act.

The Refusal to Bargain

When the Respondent received the Union's recognition request on February 11, two of the three employees in the stipulated appropriate unit had signed valid authorization cards designating the Union as their agent for purposes of collective bargaining. Respondent has stipulated that it has not recognized or bargained with the Union since February 11, the date it received the Union's letter and commenced its unfair labor practices. I agree with General Counsel that the violations of Section 8(a)(1) and (3) found warrant a finding, that Respondent's failure to recognize and bargain with the Union was not in good faith, and therefore violated Section 8(a)(5) and (1) of the Act as of February 11, 1991. See *Trading Port*, 219 NLRB 298, 301 (1975). The remaining question is whether a bargaining order is warranted. It is well established that the Board should issue a bargaining order where it finds "the possibility of erasing the effects of past practices and of ensuring a fair election—by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."¹¹

The situation before me is somewhat unusual in that, apart from Pavlovic, who is entitled to reinstatement and remains a unit employee, Respondent currently has no employees who were members of the unit at the time the Union enjoyed majority status on the basis of authorization cards. At the time of the hearing before me there were, according to Berger, two maintenance employees and one janitorial employee.

Partipilo and Pavlovic were Respondent's employees at the time of Pavlovic's discharge. Partipilo continued in Respond-

¹⁰ *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969).

ent's employ until she was discharged on or about November 15, 1991. Management, Inc. was never their employer even though it was activated immediately on the departure of Draper and Kramer. There is no evidence that Respondent's pattern of hiring individuals as its employees but leaving their direction to a management agent ever changed. Moreover, it is clear that Management, Inc. is but an agency of Respondent erected to conduct the managing of Respondent's Lofts facility. There is no showing whatsoever that Management, Inc. has any other function, any de facto existence other than as Respondent's designated agent, or any employees of its own. I therefore conclude those persons now performing maintenance and janitorial functions at the Lofts are Respondent's employees. That being so, the fact remains that all the current employees falling within the description set forth in the stipulated bargaining unit are newly hired and none has been shown to be a union supporter. This is, however, not an impediment to a bargaining order because the obligation to bargain arose and was rejected at a time the Union did enjoy majority status and was entitled to bargain on the unit employees' behalf for a reasonable time¹² and that opportunity was unlawfully denied it.

As the Board noted in *Phillips Industries*, 295 NLRB 717, 718 (1989), a case relied on by Respondent as a basis for withholding a bargaining order, a discharge in violation of Section 8(a)(3) of the Act is a "hallmark" violation likely to have a longlasting and substantially inhibiting effect on employees. Although so noting, the Board withheld a bargaining order in *Phillips*, where there were two 8(a)(3) discharges, because the bargaining unit was large (90), the likelihood of repeated unfair labor practices was small, top management committed no 8(a)(1) violations, employees could not necessarily view the violations as a reflection of company policy, and traditional remedies could, in those circumstances, create an atmosphere conducive to a free and fair election. The situation in *Phillips* is patently distinguishable from that before me. Here, we have a three-person unit, one-third of which was discriminated against, the violations were committed by top management, there is no reason to believe the likelihood of repeated unfair labor practices is small or the illegal conduct of Marc Berger and Tina Partipilo, the top managers, would not be viewed by employees as reflecting Respondent's policy concerning employee union activity. Recognizing that the current unit members are not known union supporters, and there is no indication of unfair labor practices directed at them personally, I believe that the unlawful discharge of Pavlovic will have a lasting and inhibiting effect on current employees who may wish to secure union representation and the likelihood that traditional remedies will erase the lingering effects of Respondent's unlawful actions on such a small unit of employees and thus ensure a fair election is slight and a bargaining order should issue. Accordingly, I conclude and find Respondent violated Section 8(a)(5) and (1) of the Act on and after February 11, 1991, by failing and refusing to recognize and bargain with the Union as the duly authorized collective-bargaining representative of the employees in the unit hereinabove found

appropriate for purposes of collective bargaining, and a bargaining order should issue.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for collective bargaining:

All full-time and regular part-time janitorial, maintenance, and cleaning employees employed at River West Development Limited Partnership's facility located at 925 W. Huron Street, Chicago, Illinois; but excluding office clericals, guards and supervisors as defined in the Act, and all other employees.

4. At all times since January 21, 1991, and continuing to date, the Union has been the exclusive representative of all the employees within the appropriate unit for purposes of collective bargaining.

5. By coercively interrogating an employee concerning the Union's letter of February 7, 1991, Respondent violated Section 8(a)(1) of the Act.

6. By threatening an employee with discharge because he engaged in protected union activities, Respondent violated Section 8(a)(1) of the Act.

7. By discharging Paul Pavlovic in order to discourage union membership, Respondent violated Section 8(a)(3) and (1) of the Act.

8. By refusing to bargain with the Union as the designated collective-bargaining representative of its employees in the unit hereinabove found appropriate, and by engaging in the above-described violations of Section 8(a)(3) and (1) for the purpose of undermining and destroying the Union's majority status, Respondent violated Section 8(a)(5) and (1) of the Act.

9. The violations of the Act set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. The unfair labor practices found are sufficiently serious and pervasive as to warrant a remedial order requiring Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit hereinabove found appropriate.

THE REMEDY

In addition to the usual cease and desist and notice posting requirements, my recommended Order will require Respondent to offer unconditional reinstatement to Paul Pavlovic and make him whole for wages lost as a result of his unlawful discharge, backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); Respondent will also be required to remove from its records any reference to the discharge of Paul Pavlovic and notify him that this has been done and that evidence of this unlawful action will not be used against him in any way in the future. My recommended Order will also require Respondent to recognize and bargain in good faith

¹² Cf. *Tube Craft, Inc.*, 289 NLRB 862 fn. 3 (1988), as recent tangential support for the proposition a complete change in employees resulting in a possible change in majority status does not by itself destroy an existing obligation to bargain.

with the Union on request and reduce any understanding reached to a written, signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, River West Development Limited Partnership, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning union activities.

(b) Threatening employees with discharge because they engage in protected union activities.

(c) Discharging employees in order to discourage union membership.

(d) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit hereinabove found appropriate.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of all employees in the above-described appropriate unit and, if an agreement is reached, embody such understanding in a written signed agreement.

(b) Offer Paul Pavlovic immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings suffered by reason of Respondent's unfair labor practices in the manner set forth in the remedy section of this decision.

(c) Remove from the record of Paul Pavlovic any reference to his discharge, and notify him in writing that this has been done and that the evidence of his unlawful discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its 925 West Huron Street, Chicago, Illinois facility copies of the attached notice marked "Appendix."¹⁴ Copies of the notices on forms provided by the Regional Director for Region 13 after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

We hereby notify our employees that:

WE WILL NOT attempt to discourage membership in Service Employees Local No. 1, Service Employees International Union, AFL-CIO or any other labor organization, by discharging our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT refuse to recognize and bargain with Service Employees Local No. 1, Service Employees International Union, AFL-CIO as the exclusive bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time janitorial, maintenance, and cleaning employees employed at our 925 West Huron Street, Chicago, Illinois, facility; but excluding office clericals, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT threaten our employees with discharge because they engage in protected union activity and WE WILL NOT coercively interrogate them concerning such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with Service Employees Local No. 1, Service Employees International Union, AFL-CIO as the exclusive bargaining representative of all the employees in the bargaining unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an agreement is reached, embody that understanding in a written, signed agreement.

WE WILL offer Paul Pavlovic immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole

for any loss of earnings suffered by reason of our discrimination against him, with interest thereon.

WE WILL remove from the record of Paul Pavlovic any reference to his discharge, and notify him in writing that this has been done and that the evidence of the unlawful dis-

charge will not be used as a basis for any future disciplinary action against him.

RIVER WEST DEVELOPMENT LIMITED PART-
NERSHIP